82-1879

No. ____

Office-Supreme Court, U.S.
FILED
MAY 4 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

United States Supreme Court

OCTOBER TERM, 1982

JERRY DEAN ROUSSEAU,
Petitioner,

v.

COLONEL CRISPUS NIX, COMMANDANT, U.S.D.B.,
Respondent.

On Appeal From The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Whether a military conviction, obtained by a guilty plea in the face of a capital charge, is reviewable on federal *habeas* corpus when it is undisputed that the highest executive agent of the United States in Morocco specifically and successfully ordered defense counsel not to investigate his client's case.

LIST OF PARTIES

The names of all parties to the proceeding in the United States Court of Appeals for the Tenth Circuit appear in the caption of the case in this Court.

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IN THE

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No. ____

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On Appeal From The United States Court Of Appeals For The Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

This is a Petition for a Writ of Certiorari on appeal from the decision of the United States Court of Appeals, Tenth Circuit, affirming the denial of Petitioner's application for a Writ of Habeas Corpus by the United States District Court for the District of Kansas.

Attached hereto are the opinions of the United States Court of Appeals, Tenth Circuit (Exhibit 1), the United States District Court for the District of Kansas (Exhibit 2) and the Petition For New Trial to the Judge Advocate General, United States Navy (Exhibit 3).

The date of the Judgment or Decree sought to be reviewed is March 1, 1983. The case has not been reported.

The statutory provision believed to confer on this Court jurisdiction to review the Judgment or Decree in question by a Writ of Certiorari is 28 U.S.C. 1254 (1).

STATEMENT OF FACTS

In June of 1978 Rousseau was a Marine guard stationed at the United States Embassy, Rabat, Morocco. On the morning of June 3, 1978 Rousseau was absent without leave and an American schoolteacher, Dorothy Layton, with whom Rousseau had been seen late on June 2 and early on June 3, was found dead in her Rabat apartment. Rousseau surrendered from unauthorized absence on June 7, 1978 and began twenty-eight days of uncounseled solitary confinement. Finally military counsel was appointed and interviewed Rousseau.

In this interview, Rousseau admitted being with the victim in the early morning of June 3, admitted consensual intercourse with her but denied the slaying and claimed to have been in Agadir, Morocco, three-hundred-fifty (350) miles south of Rabat, at around 11:00 A.M. on June 3. Rousseau's presence in Agadir at that time would have practically precluded him from being the slayer. Rousseau told his counsel that his presence in Agadir could be confirmed through a truck driver who had given him a ride into Agadir from an unknown location on the Rabat-Agadir highway, and a hotel clerk in Agadir. Both of these persons were Moroccan nationals unconnected with American interests in Morocco.

Acting upon the information given by Rousseau, who remained in solitary confinement, defense counsel sought transportation and an interpreter from the United States Embassy. Rather than giving assistance, the United States Ambassador, because of a jurisdictional dispute with Moroccan authorities over who was going to try Rousseau, specifically ordered defense counsel not to conduct any investigation among Moroccan nationals who were not also employees of the Embassy. This order prevented any investigation of Rousseau's possible alibi defense.

Eventually Rousseau was spirited out of Morocco and taken to Quantico, Virginia, where formal proceedings began. After an Article 32 investigation (preliminary hearing equivalent), Rousseau was referred for trial on the capital offense of murder (both premeditated murder and felony murder) and the non-capital charge of rape.

Throughout an extensive pre-trial period (August 28 through September 20) counsel vigorously asserted that the Ambassador's order had precluded defense investigation, and sought a continuance and permission to investigate in Morocco. They were thwarted at every turn.

As the convening authority (the military officer with ultimate control over charges) refused to permit the case to be tried on a non-capital basis, Rousseau and his counsel faced a stark choice: go into a capital trial with no defense evidence or avoid the capital charge by plea of guilty.

Faced with this dilemma, created by the government, Rousseau entered into a plea agreement with the convening authority. The agreement required that he plead guilty to unpremeditated murder; in return the convening authority agreed to drop the rape charge and approve a sentence no greater than confinement for fifty-five years, reduction to private, total forfeiture of pay and allowances, and a bad-conduct discharge. This bargain was fully performed by both sides. Rousseau is currently serving this sentence at the United States Disciplinary Barracks, Fort Leavenworth, Kansas.

PROCEDURAL HISTORY

Rousseau's sentence was adjudged on September 22, 1978. He appealed to the United States Navy Court of Military Review. The conviction and sentence were affirmed on February 27, 1980. NCM 79-0223. Rousseau

twice sought review by the United States Court of Military Appeals. Both petitions were denied. *United States* v. *Rousseau*, 9 M.J. 271 (1980); 10 M.J. 281 (1981). Rousseau then petitioned the Judge Advocate General of the Navy for a new trial. This petition was denied on May 21, 1981. Throughout these military proceedings, each step taken precisely in accordance with military law, Rousseau has consistently asserted that the ambassadorial order prevented investigation by defense counsel.

After total and orderly exhaustion of all avenues within the military, Rousseau turned to the civilian courts. On August 18, 1981, Rousseau filed a Petition for Writ of *Habeas Corpus* (28 U.S.C. § 2241) in the District of Kansas. Again Rousseau asserted denial of right to effective assistance of counsel—the denial specifically based in the ambassadorial order. This petition was denied on June 21, 1982. Rousseau promptly appealed to the United States Court of Appeals for the Tenth Circuit, which affirmed the District Court in an unpublished order dated March 1, 1983.

ARGUMENT

This case is spectacular in its uniqueness and its substantive simplicity. It is unique in two ways. First, there is no dispute at all about the underlying, significant fact; that all parties have agreed at every stage that the Ambassador issued the no-investigation order and that defense counsel obeyed it. Second, there is no reported American criminal case in which a duly authorized official has issued an order of the kind extant in this case.

Simplicity in substance proceeds by syllogism—undisputed facts set against undisputed, fundamental rules of law.

A. 1. A potent executive agent forbade investigation by defense counsel.

2. Investigation by defense counsel is a quintessential component of constitutional right to counsel. *Powell* v. *Alabama*, 287 U.S. 45, 57-59 (1932).

B. 1. Rousseau was denied, by executive order, right to counsel guaranteed by the Sixth Amendment.

2. A conviction obtained in contravention of Sixth Amendment right to counsel is void.

Johnson v. *Zerbst*, 304 U.S. 458, 467 (1938).

C. Rousseau's conviction is void.

THE MILITARY PROCEEDINGS

1. Raising The Claim

There is no question that this precise claim was the major issue in the military pre-trial and trial proceedings. The transcripts of those proceedings are replete with motions, arguments and orders surrounding the existence and impact of the Ambassador's order. *Trial Record at 115, 118, 121, 148, 149.* At one point in the trial record counsel (prosecutor) himself referred the Ambassador's order to "defense counsel to limit interviews to [the] American Embassy Community . . ." *Trial Record at 117-118.*

There is no question that this precise issue was anticipated by all parties as an appellate issue. It was stipulated as an exhibit to the Trial Record (the record forwarded to the military appellate court) that on July 7, 1978 the Ambassador ordered defense counsel to limit interviews to the American Embassy Community. *Appellate Exhibit XXXI to Trial Record.*

There is no question that this precise issue was presented to the Navy Court of Military Review. The Court of Appeals, Tenth Circuit, refers specifically to the NCMR decision (Page 4, Judgment, Exhibit 1).

There is no question that this precise issue was twice presented to the United States Court of Military Appeals.

Finally, Rousseau petitioned the Judge Advocate General of the Navy for a new trial. This petition specifically asked whether the Ambassador's no-investigation order violated Rousseau's constitutional rights. *Petition for New Trial* at 6.

Obviously the claim presented to the District Court and Circuit Courts below was raised continuously and vigorously at all military levels. Even if the military appellate records can be misread, the Petition for New Trial cannot be. The Petition for New Trial is a statutory proceeding (10 U.S.C. § 873, U.C.M.J. Article 73) further defined by the Manual for Court-Martial (M.C.M. 109 (rev. ed. 1969)), all of the particulars of which were fully complied with in this case.

2. Full And Fair Hearing/Scope Of Review

The courts below have decided that Rousseau, if his claim was properly raised in the military system, had a full and fair military hearing. Since civilian courts are limited to review of those constitutional claims upon where there was no full and fair military hearing, the courts below denied civilian review.

These doctrines concerning full and fair hearing and limited scope of review in the military context are found in 10 U.S.C. § 876 (U.C.M.J., Article 76) and *Burns* v. *Wilson*, 346 U.S. 137 (1953). In practical effect they are

identical to the rules in State prisoner cases arising under 28 U.S.C. § 2254 and *Sumner* v. *Mata*, 449 U.S. 539 (1981). When they are applicable, the doctrines properly limit federal court review, via *habeas corpus*, to those constitutional claims upon which the *habeas* petitioner has not received a full and fair hearing in the originating jurisdiction.

But application of those doctrines to Rousseau's case fundamentally misapprehends the nature of the doctrines and the nature of this case. The full and fair hearing doctrine relates to *factual* determinations made by the originating jurisdiction. 28 U.S.C. § 2254 speaks precisely in those terms: "determination after hearing on the merits of a factual issue . . . shall be presumed to be correct . . ." *Sumner* v. *Mata* itself arose because the federal court redetermined facts already found by a state court.

There is absolutely no factual dispute in this case; there is no need to determine ultimate facts from raw facts; there is no need to interpret ultimate facts. The crucial fact exists, it has existed in this case since the pre-trial stages and has been accepted by all participants at every stage. The fact simply is this: The United States Ambassador ordered defense counsel not to investigate Rousseau's alibi and defense counsel obeyed.

It is clear beyond cavil that federal habeas jurisdiction in military cases extends to plenary review of general orders and regulations alleged to contravene the constitution. E.g., *Kennedy* v. *Commandant*, 377 F.2d 339 (10th Cir. 1967) (U.C.M.J. permitted non-lawyer defense counsel); *Wallis* v. *O'Kier*, 491 F.2d 1323 (10th Cir.), *cert. denied*, 419 (U.S. 901 (1974) (Manual for Courts-Martial authorized search warrant without sworn affidavit). *Habeas* review in such cases is not limited by 10 U.S.C.

§ 876 (U.C.M.J., Article 76) and *Burns* v. *Wilson* because there is no factual issue to be resolved. The order or regulation existed, it was applied to this *habeas* petitioner, and its constitutionality must be determined because *habeas* lies when the petitioner "is in custody in violation of the Constitution . . . of the United States. . . ." 28 U.S.C. § 2241 (c) (3).

If a general military order were issued forbidding defense investigation in courts-martial cases, plenary *habeas* review would clearly be appropriate. That the ambassadorial order in this case was specific rather than general makes no difference. The Sixth Amendment violation accruing to Rousseau is the same in either event.

Obviously, then, the full and fair hearing doctrine, and the concomitant limitation on scope of review have no place in Rousseau's case.

3. Waiver

To the extent the courts below recognized that the full and fair hearing doctrine would not make Rousseau's substantive claim go away, the waiver ploy was implemented. As with the other procedural doctrines used in this case to evade the substantive issue, the waiver doctrine is simply inapposite.

Tollett v. *Henderson*, 411 U.S. 258 (1973), involved a guilty plea after indictment by an improperly selected grand jury; the Court held that the guilty plea waived any antecedent objection to the composition of the grand jury. Of course, the action of a grand jury, properly or improperly selected, does not impinge upon the likelihood of an accurate and reliable trial outcome. *Menna* v. *New York*, 423 U.S. 61 (1975), held that a double jeopardy claim was not waived by guilty plea because the trial

court was without jurisdiction, no matter how factually guilty the defendant, if he had already suffered a conviction for the same offense.

If *Menna* v. *New York* has any relevance to Rousseau's case, it supports his petition. In 1938 this Court said that effective counsel is "an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty." *Johnson* v. *Zerbst*, 304 U.S. 458, 467 (1938). Since the ambassadorial order obviously denied Rousseau the investigational component of right to counsel, the court-martial was without jurisdiction and *Menna* v. *New York* permits his claim to be raised despite his guilty plea.

When *Tollett* v. *Henderson* and the *Menna* footnote* are examined carefully, it is clear that neither preclude Rousseau's claim. The whole process of extending Sixth Amendment right to counsel into the pre-trial stages of a criminal prosecution is to insure that counsel will be able intelligently to defend the client; intelligent defense includes evaluating available defenses; defenses controvert factual guilt. When counsel is forbidden to investigate during the pre-trial period he loses his ability intelligently to defend—to controvert factual guilt. When the government, by executive order, has effectively stripped the accused of any ability to present defenses he has no choice but to plead guilty, especially where a death sentence is a very real prospect. Yet the Tenth Circuit held that the very governmental conduct which forced Rousseau into the guilty plea is insulated from review by the guilty plea.

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*_Menna_ v. _New York_, supra, at 62 n.2: "A guilty plea . . . renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt. . . ."

The Circuit Courts generally have recognized the absurdity of such reasoning. When the defense has been unable to investigate, the antecedent violation *is* logically inconsistent with the establishment of guilt. Thus when counsel was ineffective because late appointment prevented investigation or because counsel simply failed to investigate, the ineffective assistance of claim has survived the guilty plea. *Hawkman* v. *Parratt*, 661 F.2d 1161 (8th Cir. 1981); *Ford* v. *Parratt*, 638 F.2d 1115 (8th Cir. 1981);* cf., *United States* v. *Freed*, 688 F.2d 24 (6th Cir. 1982).

When the investigation is prevented by a specific executive order, as in this case, the application of a waiver-by-plea rule is even worse. If a guilty plea caused by ineffeciency or negligence in investigation does not waive the claim, then the claim cannot be waived when the government has expressly, by executive order, prevented investigation of defense and hence forced the guilty plea.

There is yet another reason why the application of waiver-by-plea was inappropriate in this case. The Navy Court of Military Review took cognizance of Rousseau's claim that the ambassadorial order violated his Sixth Amendment right. Since *Lefkowitz* v. *Newsome*, 420 U.S. 283 (1975), it has been clear that a constitutional claim which, under the law of originating jurisdiction, survives the plea is cognizable on federal *habeas*. *Brom-*

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*This court vacated *Ford* v. *Parratt* for reconsideration in light of *Sumner* v. *Mata* 454 U.S. 934 (1981). That was done because the Eighth Circuit in *Ford* v. *Parratt* redetermined facts already found by the state court. The vacation does not affect the vitality of the reasoning in *Ford* v. *Parratt* as applied to this case in which only a pure application of the Sixth Amendment to undisputed facts is needed.

ley v. *Crisp*, 561 F.2d 1351 (10th Cir. 1977) (en banc), *cert. denied*, 435 U.S. 908 (1978); *Journigan* v. *Duffy*, 552 F.2d 283 (9th Cir. 1977); *Langella* v. *Commissioner*, 545 F.2d 818 (2d Cir. 1976). Under military law Rousseau's claim survived his plea, therefore it survived the plea for purposes of federal *habeas* review.

REASON FOR GRANTING THE WRIT

The decisions of the courts below are not based on reality or law. A plea of guilty induced by circumstances controlled entirely by the United States Government is subject to Habeas Corpus on constitutional violation grounds.

CONCLUSION

There is no disputed fact underlying Rousseau's constitutional claim. The government admitted in the pretrial, stipulated on the military appeal and has continued to admit throughout the civilian proceedings that the United States Ambassador ordered Rousseau's defense counsel not to investigate his defense, and that defense counsel obeyed. This Order was a patent violation of the Sixth Amendment as it has been interpreted since the 1930's. Rousseau's conviction should be voided. The lower courts have evaded their constitutional obligations to Rousseau by erecting procedural barriers to substantive review. None of the procedural doctrines used to erect those barriers has any place in Rousseau's case. Therefore, this Court should review Rousseau's case and direct

the courts below to issue the writ, or alternatively, to consider Rousseau's substantive constitutional claim.

Respectfully submitted,

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EXHIBIT I

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 82-1870
(D.C. No. 81-3180)

JANUARY TERM—March 1, 1983

Before HONORABLE OLIVER SETH, HONORABLE JAMES E. BARRETT and HONORABLE MONROE G. MCKAY, Circuit Judges.

JERRY DEAN ROUSSEAU,
Plaintiff-Appellant,

v.

COLONEL CRISPUS NIX, COMMANDANT, U.S.D.B.,
Defendant-Appellee.

FILED
MAR - 3 1983
ARTHUR G. JOHNSON, Clerk
By DEE MEISSNER Deputy

JUDGMENT

Upon consideration of the record on appeal and the files of this court, it is ordered that the judgment of the United States District Court for the _____ District of Kansas is affirmed on the court's own motion pursuant to Rule 9 of the Rules of this Court.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 82-1870

JERRY DEAN ROUSSEAU,
Plaintiff-Appellant,

v.

COLONEL CRISPUS NIX, COMMANDANT, U.S.D.B.,
Defendant-Appellee.

Appeal From The United States District Court
For The District Of Kansas
(D.C. No. 81-3180)

FILED
United States Court of Appeals
Tenth Circuit
MAR 01 1983
Howard K. Phillips
Clerk

Submitted on the briefs pursuant to Tenth Circuit Rule 9:

Maurice F. Biddle, Flint Hill, Virginia, for Plaintiff-Appellant.

Jim J. Marquez, United States Attorney, and Alleen S. Castellani, Assistant United States Attorney, Topeka, Kansas, for Defendant-Appellee.

Before SETH, Chief Judge, BARRETT and MCKAY, Circuit Judges.

PER CURIAM.

The three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed.R.App.P. 34(a); Tenth Circuit R. 10(e). The cause is therefore ordered submitted without oral argument.

This is an appeal from an order of the district court dismissing appellant's petition for a writ of habeas corpus.

Appellant was convicted of unpremeditated murder pursuant to a plea of guilty by a military court-martial. Throughout his military appeals as well as in his habeas petition before the United States District Court for the District Court of Kansas, appellant contended that he was denied his Sixth Amendment right to the effective assistance of counsel. More specifically, petitioner alleges 1) that the United States government expressly forbade petitioner's defense counsel from investigating his alibi in Morocco, where the murder occurred; and 2) that petitioner's defense counsel misapprehended both the legal and factual elements of his case by mispresenting the realistic possibility of a death sentence, by failing to properly assess certain evidentiary issues and by assisting in the execution of his confession.

At the onset we note that the scope of review of a military court-martial by a civilian court is very narrow. In 1953 the Supreme Court set forth the standard for reviewing a military conviction on a petition for a writ of habeas corpus which is still the definitive law today. Burns v. Wilson, 346 U.S. 137 (1953). In *Burns* the court said in the following familiar language: "[W]hen a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to reevaluate the evidence. . . ." 346 U.S. at 142. The record before us shows that appellant's Sixth Amendment contentions with respect to the assistance he received from counsel in making his decision to plead guilty were argued and considered before the United States

Navy Court of Military Review. In rejecting appellant's contentions, the court said:

> In support of their contention that the accused was pressured by his detailed and individual military defense counsel into pleading guilty, appellate defense counsel have submitted unsworn letters of the accused to appellate and trial defense counsel, notes made by the accused concerning conversations with his trial defense counsel, and an outline prepared by his trial defense counsel. Having clearly examined these papers, we find no merit in the defense contention. These papers indicate that the accused was advised of his options and chose to plead guilty. They do not show that trial defense counsel misrepresented the strength of the government's case or failed to advise the accused of the government's burden of proof. The thorough providence inquiry of the military judge demonstrates the voluntariness of the accused's pleas. Unlike appellate defense counsel, we fail to find misconduct in trial defense counsel's introduction of a written statement by the accused in extenuation and mitigation. Such action was calculated to benefit the accused. We find the accused's pleas to be voluntary and reject the contention that trial defense counsel were guilty of misconduct and did not effectively assist with the accused.

The issue was also raised in appellant's petition for grant of review by the United States Court of Military Appeals. That court, however, as authorized by Article 67 of the Uniform Code of Military Justice, 10 U.S.C. § 867, twice refused to grant review on this issue. A petition for new trial was thereafter denied by the Judge Advocate General of the Navy.

We hold that the record shows there was full and fair consideration of appellant's second contention, regarding factual ineffective assistance of counsel, by the military courts upon presentation of the facts and law within the meaning of Burns v. Wilson, 346 U.S. 137 (1953), such that this issue is beyond the scope of our review herein. *Accord* Kehrli v. Sprinkle, 524 F.2d 328 (10th Cir. 1975), *cert. denied*, 426 U.S. 947 (1976); King v. Moseley, 430 F.2d 732 (10th Cir. 1970).

With respect to appellant's other contention, that he was denied the effective assistance of counsel because his attorney

was not permitted to investigate or interview anyone outside the American Embassy Community, it is not clear whether appellant properly raised this issue in the military courts. If he did not, we will not consider it for the first time in an application for habeas corpus relief. King v. Moseley, 430 F.2d 732 (10th Cir. 1970).

The brief submitted by appellant to the United States Navy Court of Military Review seems to raise this issue only in the context of the Sixth Amendment right to a speedy trial. Appellant argued that he was without the effective assistance of counsel for nearly a month after confinement. However, there is also language in the brief to the effect that refusal to permit counsel to investigate or interview witnesses is a violation of the Sixth Amendment right to counsel. The military courts appeared to consider the issue solely as a speedy trial matter. In these circumstances we consider the claim.

In Menna v. New York, 423 U.S. 61 n.2 (1975), the Supreme Court stated that:

> [a] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established.

See also Tollett v. Henderson, 411 U.S. 258 (1973).

Here the military courts, after full and fair consideration, concluded that the guilty plea was voluntary and intelligent. Our only consideration, then, is whether the allegation of enforced ineffective assistance of counsel such as the one made here is inconsistent with the valid establishment of factual guilt. We hold that it is not. Once appellant entered a voluntary and intelligent plea of guilty, it was irrelevant whether or not defense counsel was permitted a free hand to investigate the

circumstances of the crime. This claim did not survive the guilty plea.

The judgment of the district court is affirmed. The mandate shall issue forthwith.

EXHIBIT II

JUDGMENT ON DECISION BY THE COURT

United States District Court

FOR THE
DISTRICT OF KANSAS

Civil Action File No. 81-3180

JERRY DEAN ROUSSEAU,

Petitioner,

v.

COLONEL CRISPUS NIX, COMMANDANT, U.S.D.B.,

Respondent.

JUDGMENT

This action came before the Court, HONORABLE EARL O'CONNOR, United States District Judge, presiding and a decision having been duly rendered,

It is Ordered and Adjudged that this action be, and it is hereby dismissed.

FILED
JUN 28 1982
ARTHUR G. JOHNSON, Clerk
/s/ By DEE MEISSNER Deputy

Dated at Topeka, Kansas, this 28th day of June, 1982.

Arthur G. Johnson
ARTHUR G. JOHNSON
Clerk of Court

/s/ By Dee Meissner
DEE MEISSNER
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CIVIL ACTION
No. 81-3180

JERRY DEAN ROUSSEAU,

Petitioner,

v.

COLONEL CRISPUS NIX, COMMANDANT, U.S.D.B.,

Respondent.

FILED
JUL 28 1982
ARTHUR G. JOHNSON, Clerk
By DEE MEISSNER Deputy

MEMORANDUM AND ORDER

In this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, petitioner challenges his 1978 court-martial conviction for unpremeditated murder, claiming that he was denied his Sixth Amendment right to effective assistance of counsel. In particular petitioner alleges that (1) the United States Government expressly forbade petitioner's defense counsel from investigating petitioner's alibi in Morocco, where the murder occurred; and (2) petitioner's defense counsel misapprehended both the legal and factual elements of petitioner's case by misrepresenting the realistic possibility of a death sentence, by failing to properly assess several evidentiary issues, and by assisting in the execution of petitioner's confession.

Petitioner was convicted during the period August 28 - September 22, 1978, by a General Court-Martial convened by the Commanding General, Marine Corps Development and Education Command, Quantico, Virginia. Pursuant to a pretrial

agreement between petitioner and the convening authority, petitioner pled guilty to unpremeditated murder, which was a lesser-included offense of the alleged premeditated murder by stabbing contained in Charge I, Specification 1. The military judge conducted a detailed inqury into the voluntariness of petitioner's entry into the pretrial agreement and thoroughly advised petitioner of the effect of a plea of guilty, including the waiver of important constitutional right. Having thoroughly examined the petitioner concerning his proffered plea of guilty, the military judge accepted the plea and found him guilty of unpremeditated murder. A second specification under Charge I and a second charge and specification were then withdrawn by the government. Government's Exhibit B, pp. 712-44. After presentence proceedings, the military judge sentenced petitioner to be confined at hard labor for life, to forfeit all pay and allowances, to be reduced to pay grade E-1, and to be dishonorably discharged from the service. After reviewing the record of petitioner's trial on December 7, 1978, the Staff Judge Advocate recommended that the Commanding General approve the findings and that all confinement in excess of fifty-five years be disapproved to comply with the provisions of the pretrial agreement. On December 20, 1978, the Commanding General approved the findings and the sentence providing for confinement at hard labor for a period of confinement to a period of fifty-five years, reduction to the rank of private, pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge.

Pursuant to Article 66(b) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, the case was forwarded for review by the United States Navy Court of Military Review, which granted a Motion to Remand For New Convening Authority's Action. Upon remand the convening authority on March 21, 1979, approved the sentence that had been approved on December 20, 1978. The case was then returned to the United States Navy Court of Military Review. An assignment of error was filed on September 28, 1979. On February 27, 1980, the Navy Court of Military Review affirmed the findings

of guilt and sentence as approved on review below. Petitioner then petitioned the United States Court of Military Appeals on March 19, 1980, to review his conviction and sentence. This request for reeview was summarily denied on August 8, 1980, and petitioner's petition for reconsideration was denied on January 9, 1981. Throughout these proceedings petitioner was represented by military defense counsel. We are satisfied from the record before us that petitioner has exhausted all military remedies available to him.

A military tribunal is an Article I legislative court, and as such, exercises its jurisdiction independent of the judicial power exercised by this court under Article III of the Constitution. *Gosa* v. *Mayden*, 413 U.S. 665, 686 (1973). The federal courts exercise no appellate jurisdiction over the judgments of military tribunals. *Schlesinger* v. *Councilman*, 420 U.S. 738, 746 (1975). The jurisdiction of civil courts in habeas corpus petitions arising from court-martial convictions limited to determining whether the military courts have exceeded their jurisdiction, *Hiatt* v. *Brown*, 399 U.S. 103, 110-11 (1950), and to examining claims of constitutional dimension, *Burns* v. *Wilson*, 346 U.S. 137, 142 (1953); *Kehrli* v. *Sprinkle*, 524 F.2d 328, 331 (10th Cir. 1975), cert. den. 426 U.S. 947 (1976). Petitioner has not questioned the jurisdiction or sentencing power of the court-martial, but argues violation of his constitutional rights. Review of constitutional claims, however, is severely limited.

> The first inquiry is whether the claim of error is one of constitutional significance, or so fundamental as to have resulted in a miscarriage of justice. Most courts which have interpreted *Burns* to allow review of nonjurisdictional claims have given cognizance only to assertions that fundamental constitutional rights were violated.
>
> *Calley* v. *Calloway*, 519 F.2d 138, 199 (5th Cir., 1975), *cert. den., sub nom, Calley* v. *Hoffman*, 425 U.S. 911 (1975).

Even if violation of a fundamental constitutional right is alleged, Congress has provided by statute, 10 U.S.C. § 876 (Article 76 of the UCMJ), that military court decisions are

final, conclusive and binding on all courts of the United States. This restricts the scope of review of federal courts in military habeas cases.

> The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights. In military habeas corpus cases, even more than in state habeas corpus cases, it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings—of the fair determinations of the military tribunals after all military remedies have been exhausted. Congress has provided that these determinations are "final" and "binding" upon all courts. We have held before that this does not displace the civil courts' jurisdiction over an application for habeas corpus from the military prisoner. *Busik* v. *Schilder*, 340 U.S. 128 (1950). But these provisions do mean that when a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence. *Whelchel* v. *McDonald*, 340 U.S. 122 (1950).
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> *Burns* v. *Wilson*, 346 U.S. 137, 142 (1953).

Petitioner presented his claims of ineffective assistance of counsel, including his allegation that the government prohibited investigation of petitioner's alibi defense in Morocco and his allegation that defense counsel did not appreciate the legal and factual elements of petitioner's case, to the Navy Court of Military Review. Both issues were fully briefed in petitioner's Assignment of Error filed September 28, 1979. Government's Exhibit A, at 117-23. These claims were rejected by the Navy Court of Military Review after full and fair consideration. Government's Exhibit A, at 79-81. Under *Burns* we are precluded from re-evaluating the evidence. By pleading guilty petitioner waived his opportunity to further litigate the allegation that his defense counsel was prohibited from conducting a full on-the-scene investigation in Morocco. *Menna* v. *New York*, 423 U.S. 61, 63 n.2 (1975); *Tollett* v. *Henderson*, 411 U.S. 258 (1973). The military judge in questioning petitioner about the voluntariness of his plea of guilty specifically pointed out to

petitioner that litigation on this discovery issue would be waived. Government's Exhibit B at 740. Having carefully reviewed the entire record before us, which includes a transcript of the inquiry leading to the acceptance of petitioner's guilty plea, briefs filed in the Navy Court of Military Review, the exhibits filed in support of the habeas petition, and an affidavit by one of the attorneys who represented petitioner in the military courts, we conclude that this record clearly shows petitioner's defense counsel exercised "the skill, judgment and diligence of reasonably competent defense attorney" that is demanded by the Sixth Amendment. *Dyer* v. *Crisp*, 613 F.2d 275, 278 (10th Cir. 1980).

IT IS THEREFORE ORDERED that this action be and the same is hereby dismissed. The clerk is directed to transmit copies of this Memorandum and Order to the parties herein and the office of the United States Attorney.

Dated this 21st day of June, 1982, at Kansas City, Kansas.

/s/ Earl E. O'Connor
EARL E. O'CONNOR, Chief Judge

EXHIBIT III

NCM NO. 70-0223
DOCKET NO. 38,330

JERRY D. ROUSSEAU, 549-04-0465
CORPORAL, UNITED STATES MARINE CORPS,
Petitioner

v.

UNITED STATES,
Respondent

PETITION FOR NEW TRIAL
AND BRIEF IN SUPPORT

TO THE JUDGE ADVOCATE GENERAL OF THE NAVY

PREAMBLE

The undersigned, counsel for Petitioner*, hereby prays in accordance with Article 73, Uniform Code of Military Justice (hereinafter UCMJ), 10 USC 873 (1976) and paragraph 109, *Manual for Courts—Martial, United States*, 1969 (Revised Edition, hereinafter MCM 1969), that he be granted a new trial for the reasons set forth *infra*.

STATEMENT OF THE CASE

Petitioner was tried at Quantico, Virginia, before a military judge sitting as a general court-martial during the period 28 August-22 September, 1978. In accordance with his pleas he was found guilty of unpremeditated murder in violation of Article 118, UCMJ. He was sentenced to confinement at hard labor for life, forfeiture of all pay and allowances, reduction to the rank of private, and dishonorable discharge. Pursuant to a plea bargain, on 21 March, 1979, the convening authority approved only so much of the sentence as provided for confine-

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*Representation authorization has been previously filed with the Naval Court of Military Review.

ment at hard labor for fifty-five (55) years, reduction to the rank of private, forfeiture of all pay and allowances and dishonorable discharge.

The Naval Court of Military Review affirmed the Trial Court's finding and sentence of 27 February 1980. Petitioner's Petition for Grant of Review was denied by the Court of Military Appeals (COMA) on 8 August 1980. A subsequent Petition for Reconsideration of the COMA denial of certiorari was denied by COMA on 13 January, 1981.

JURISDICTION STATEMENT

This petition is being filed over two years after the convening authority's approval on 21 March, 1979 of the Petitioner's court-martial's finding and sentence. In the interests of justice and because the evidence justifying the instant petition first became available to Appellate Counsel in early 1981, a waiver of the two year provision set out in Article 73 and Paragraph 109 (a), UCMJ is requested.

STATEMENT OF FACTS

Petitioner requests a new trial based on violation of his United States Constitutional rights under the FIFTH and SIXTH amendments to the Constitution. Specifically, the actions of the United States authorities in Morocco who prohibited and prevented his trial defense counsel from interviewing Moroccan and other resident witnesses who could have furnished evidence establishing an alibi had the effect of denying Petitioner his FIFTH Amendment rights.

In addition, the actions of Petitioner's assigned counsel placed Petitioner in a position where he had no choice but to plead guilty.

Because of a jurisdictional dispute between the government of Morocco and the United States as to which entity was entitled to bring Petitioner to trial, the United States Ambassador issued orders that any investigation by Petitioner's counsel was to be confined to members of the Embassy community only.

Petitioner advised his counsel that he recalled sitting on a curb in the Kasbah Oudaiah after having come from Mrs. Layton's villa to her car in search of wine. Petitioner had no recollection from that time until the following morning.

Petitioner advised his counsel he recalled awakening in a culvert somewhere in the south of Morocco, exact time unknown, but before noon on June 3, 1978*. Petitioner further advised his counsel that he had obtained a ride late in the morning of June 3 in a Moroccan company truck which had the company name printed on the side. The identity of the driver was unknown to Petitioner but should have been obtainable through investigation of the trucking company's records.

Petitioner advised his counsel he had checked into a motel on the outskirts of Agadir, Morocco, after leaving the truck. Petitioner furnished the name of the motel and its location. The time of his check-in should have been obtainable if investigation had been allowed.

Since Agadir is at least an eight hour drive from Rabat, for Petitioner to have committed the murder would have meant he had to have been in Rabat no later than 2:30 A.M. A witness (medical doctor) at trial testified that the murdered woman's thorax was still warm at 0930 when he examined the body. (See infra). He also said rigor mortis had not set in, and termed time of death as "recent."

Petitioner told his counsel he dropped off his date (Liza Beamish) of the evening of 3 June at 1:30 A.M., and then went over to Mrs. Layton's villa next door, creating a disturbance when he went over the wall. This caused Liza Beamish to scream and awakened the neighbors. Mrs. Layton came out, reassured the neighbors and had Petitioner apologize to Liza Beamish for frightening her. Petitioner and Mrs. Layton returned to her villa. Testimony of Liza Beamish establishes

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*Under hypnosis, Petitioner gave the time of his awakening at around 10:30 A.M.

Mrs. Layton was alive at approximately 2:15 A.M., June 3, 1978. (See Inv. Exh. 32, R37, Article 32 Investigation and R326, Trial Proper).

After their return to the villa, Mrs. Layton and Petitioner drank wine together and then went upstairs to her bedroom. Petitioner told his counsel that after consensual intercourse with Mrs. Layton he wanted more wine. Mrs. Layton said she had a bottle in the trunk of her car. Petitioner donned a pair of cut-off khakis he found in the closet, took a set of her keys and went down to the parking area to look for her car. At first he was unable to find it but finally did, although he could not find any wine in the trunk. Shortly thereafter, while Petitioner was sitting on a curb outside the Kasbah, he was approached by two men who offered to take him home because he obviously had had too much to drink. They put him in a car and took him for a long ride. It was at this point that his conscious memory failed him.

The above details have been recounted to make the point that the time his memory failed must have been at least 3:00 A.M., in view of the fact that there is positive evidence Mrs. Layton was alive at 2:15 A.M. and there had been several time consuming activities between that time and the time his memory failed him.

Petitioner's counsel had all this information but was prevented by the Ambassador's prohibition from substantiating it. The prohibition prevented the most elemental aspects of investigation such as talking to the police to ascertain if any effort had been made to establish the time of death. Counsel also did not interview Dr. Sinclair-Loutit, an English M.D., resident in Morocco, who was the first to examine Mrs. Layton's body.* Dr. Sinclair-Loutit was not a member of the

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*Dr. Sinclair-Loutit later testified at the Article 32 investigation and at the trial proper (R42-56), Article 32 Investigation; R370-379, Record of Trial Proper). He testified at the trial (R373) that in his professional opinion, Mrs. Layton was "definitely *recently* dead be-

Embassy community and was therefore on the Ambassador's proscribed lists of persons unavailable to counsel.

During the period June 7 to July 30, 1978, Petitioner was held in solitary confinement in the American Embassy in Rabat. His only contact with the outside world during that period was a brief encounter with a Lt. Black, a legal officer assigned to counsel him and who did so, with a disclaimer that he would not represent Petitioner, and Captain Michael Osjada, counsel assigned to defend by the convening authority. From July 30 to and including the trial period ending on September 22, 1978, Petitioner had no other outside contacts.

On arrival at Quantico, charges were preferred, served, and an Article 32 investigation conducted. The case was referred for trial as a capital case. Trial was begun on 28 August, 1978. Sessions were held on 28, 29 and 30 August and 1, 7 and 8 September. The proceedings (Article 39a) were recessed to permit psychological examination, apparently in an effort to refresh or bring back Petitioner's memory.

Petitioner underwent psychological testing by two experts in the field, one of whom was a hypnotist. Under hypnosis, Petitioner denied murdering Dorothy Layton and accounted for his time from approximately 2:30 A.M. to 10:30 A.M. the following morning. Both counsel were present during the session and heard Petitioner's answers. The two psychological experts gave, as their professional, expert opinion, that Petitioner was innocent and could not have committed the offenses of which he was charged. They promised to submit a written report. This examination was held on 17 September, 1978. (See Affidavit, Exh. 1).

On 19 September, 1978, Petitioner was advised by counsel that he had to undergo a polygraphic examination in Alexandria, Virginia. The polygraph was operated by Ms. Mary Ben-

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cause there was not complete rigor mortis." Further, his examination of the body around 9:30 A.M. disclosed her thorax to be still warm.

der, of the firm of Bender and Associates, which had been selected by Petitioner's counsels.

At the conclusion of the polygraph examination, Petitioner was advised that he had failed the test. He was told by his counsels that the government knew of the lie detector test, and could get the results for use at the trial. They told him he was sure to be found guilty of murder and rape if he pleaded not guilty and that a death sentence was positive. They said they could negotiate an agreement with the prosecutor under which he would drop the murder/rape charges and remove any possibility of a death sentence. He was told if he pleaded guilty he would have to tell the judge a story the judge would believe. Counsels furnished Petitioner with a scenario to accomplish that objective.

Petitioner's counsel notified the psychological experts that Petitioner had confessed and asked that their report cover only the tests they had administered without regard to the conclusions they had reached, since the confession rendered them moot.

Petitioner was told by his counsels that the law required he make a written confession and that it had to be introduced as evidence. Petitioner did plead guilty and, on advice of counsel, requested trial by judge alone. He was convicted of unpremeditated murder (the other charges were dropped) and sentenced to life imprisonment. In accordance with the plea bargain, the sentence was reduced to fifty-five (55) years confinement.

STATEMENT OF ISSUE

1. Whether the orders of the United States Ambassador to Morocco restricting counsel's investigation to Embassy community people only was a violation of Petitioner's Constitutional rights to Due Process under the Fifth Amendment,

2. Whether the errors of commission or omission on the part of counsel set forth in the statement of facts supra, con-

stituted ineffective assistance of counsel in violation of Petitioner's Constitutional rights under the Sixth Amendment.

ARGUMENT IN SUPPORT OF ISSUES

ISSUE NO. 1

Petitioner contends that prior to trial his counsel had an affirmative obligation to make suitable inquiry to determine whether a valid defense existed. (*Jones* v. *Cunningham*, 313 F.2d 347, 353 (4th Cir. 1963); *Gaines* v. *Hopper*, 430 F. Supp., 1173 (D.C. Ga.); Petitioner was entitled to rely on counsel's independent examination of facts (*Van Moltka* v. *Gillies*, 332 U.S. 708, 720 (1948). In the instant case, Petitioner furnished his counsel with names, dates, times and places which would have furnished conclusive alibi evidence.

His counsel was prohibited by the U.S. Ambassador's restriction from questioning anyone not a member of the Embassy Community. All those who could have furnished alibi evidence were Moroccans outside the Embassy Community. While the Ambassador may have had justifiable diplomatic reasons for his decision, his action had the undeniable effect of keeping Petitioner's counsels from seeking and obtaining information which could have completely exonerated the Petitioner.

Pre-trial investigatory procedure is a jurisdictional prerequisite to valid court-martial conviction. (*Humphrey* v. *Smith*, 336 U.S. 895 (1949); 10 USC 832 (d) (1956). Any inquiry on review of denial of investigative services is whether prejudice was established by clear and convincing evidence. (*United States* v. *Harris*, 542 F.2d 1283 (7th Cir. 1976), cert. denied, 430 U.S. 934 (1977); *Christian* v. *United States*, 398 F.2d 517 (10th Cir. 1968). Where it appears there was prejudice, Sixth Amendment guarantees are contravened. In the instant case, denial by administrative fiat of investigatory services resulted in the inability to establish an alibi and was clearly prejudicial to Petitioner and in violation of his rights under the Sixth Amendment.

ISSUE NO. 2

Petitioner's contention of ineffective assistance of counsel in violation of his Sixth Amendment rights is based on the following conduct of his assigned trial counsels:

1. Counsel advised Petitioner that a death sentence was a certainty if he was convicted after a plea of not guilty to the charges against him. Petitioner's written confession and his testimony in response to the military judge's questioning make it clear that there was virtually no possibility a death sentence would ensue. The scenario presented of the homicide was clearly one in which premeditation was not involved.

2. Counsel failed to advise Petitioner that there had not been a death sentence executed in the military services in approximately the last twenty years, and in the Marine Corps for over one hundred years.

3. Counsel urged Petitioner to plead guilty after they were denied the opportunity to interview witnesses who could have established an alibi. Keeping in mind that the prosecution had purely circumstantial evidence, and further keeping in mind that none of the fingerprints taken from Mrs. Layton's villa matched those of the Petitioner, counsel's pressure on Petitioner constituted ineffective assistance.

4. At the time of trial, defense counsel were in possession of test results from the Federal Bureau of Investigation which concluded that none of the many fingerprints taken from the scene of the crime matched the fingerprints of the Petitioner.

5. Counsel failed to cross-examine witnesses at the Article 32 hearing to establish the time of death—a crucial defense factor in the case.

6. Counsel insisted on a polygraph examination even after a hypnotic session by experts corroborated the Petitioner's claim of innocence. In taking such action, counsel demonstrated that they were not capable of rendering effective counsel for the simple reason that they apparently did not believe their client.

7. Counsel completely disregarded the expert opinions of two psychologists eminently qualified in their fields, who believed the Petitioner to be innocent based on their examination of him.

8. Counsel advised Petitioner that unless he followed a scenario labeled "suggestions" in preparing his written confession, he ran the risk of the judge not accepting his plea of guilty and a consequent breakdown of the plea bargain process.

9. Counsel advised Petitioner that the law required Petitioner to prepare a confession in his own hand to be submitted in evidence after a plea of guilty.

10. Counsel arranged for the psychologists to omit from their report of the hypnosis sessions any reference to Petitioner's explanation of the events, by informing them that Petitioner had "confessed."

ARGUMENT

Petitioner, based on what his counsels told him repeatedly, believed the court would find him guilty and execution of a death sentence would be a certainty. A competent appraisal of precedents in military justice system by counsel would have shown that the chance of a death sentence being executed was not a viable probability.

Even if the entire scenario regarding Mrs. Layton's death elicited by the hearing were true, it should have been obvious to counsel that the charge of murder with premeditation could not be sustained. By informing Petitioner that the government could absolutely succeed in all its charges, the Petitionr felt he had no choice but to plead guilty.

While it is true that counsel engaged in numerous legal or technical arguments, they did not pursue the most basic defense: the development of facts which would either show outright innocence, or at the very least, the presence of reasonable doubt. The Petitioner was entitled to such representation and did not receive it.

Counsel repeatedly urged Petitioner to plead guilty. With the chilling certainty (according to his counsel) of a death sentence, Petitioner felt that he had no choice. He therefore was not in a position to make an intelligent plea of guilty.

The two assigned counsel, both young captains, breached the first duty of a defense consel, i.e., to defend their man whether they personally believed him or not. It is fairly obvious they did not believe Petitioner's recital of events of the early morning hours of June 3. It is equally obvious they focused their defense efforts on legal technicalities. Witness the plethora of motions they presented to the Court, rather than establishing a factual defense which should have been their action if they had made more than a cursory examination of the facts. Because of their own conceptions, they went beyond the bounds of advocacy, defensive or otherwise, by repeatedly urging Petitioner to plead guilty, with the alleged certainty of a death sentence if he did not so plead.

The use of 'half-truths' to a relatively uneducated, naive, scared twenty-two year old by dangling a death sentence in front of him without explaining that execution of such a sentence even if adjudged was unlikely, and that premeditated murder would be most difficult to establish clearly constitute ineffective assistance of counsel in violation of Petitioner's Sixth Amendment rights.

Likewise, the intimation to him that having 'failed' the polygraph test (which they arranged for and which was totally unnecessary since they already had the opinion of two experts as to guilt or innocence) results would be made available to the government to Petitioner's detriment was below the level of effective representation.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Petitioner prays that he be granted a new trial.

/s/ Jerry D. Rousseau
JERRY D. ROUSSEAU

/s/ Maurice F. Biddle
MAURICE F. BIDDLE
Counsel for Petitioner
The Old Parsonage
P.O. Box #60
Flint Hill, Virginia 22627

Sworn to and subscribed before me on this ____ day of _____, 1981, by the said Jerry D. Rousseau at _____.

My Appointment expires: _____